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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KIRBY SPENCER,	)	Case No.: 2:14-cv-01833-MMD-GWF
	)	
Plaintiff,	)	OPPOSITION TO DEFENDANT
	)	MRS BPO LLC'S MEMORANDUM OF
vs.	)	POINTS AND AUTHORITIES IN SUPPORT
	)	OF ITS MOTION FOR JUDGMENT ON
MRS BPO, LLC, a foreign limited-liability	)	THE PLEADINGS
company doing business in Nevada,	)	
	)	
Defendant.	)	
	)	

**OPPOSITION TO DEFENDANT MRS BPO LLC'S MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiff, Kirby Spencer ("Spencer") by and through his attorney, Craig K. Perry, Esq. of the law firm of Craig K. Perry & Associates, hereby files his Opposition to Defendant MRS BPO LLC's Memorandum Of Points and Authorities In Support of Its Motion For Judgment On The Pleadings and requests that said motion be denied and/or that Plaintiff be granted leave to amend.

Plaintiff bases his Opposition upon all the papers and pleadings of record on file herein and the  
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1 Points and Authorities, Exhibits and Declaration of Craig K. Perry, Esq. attached hereto.

2 DATED this 24th day of March, 2015.

3 CRAIG K. PERRY & ASSOCIATES

4  
5 /s/ Craig K. Perry, Esq.

6  
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13 **POINTS AND AUTHORITIES**

14 **I.**

15 **PRELIMINARY STATEMENT**

16 Plaintiff ("Spencer") has filed an action under the TCPA (Telephone Consumer Protection Act),  
17 alleging that Defendant ("MRS") violated the TCPA, by making non-consented to "robocalls" to  
18 Spencer's cellular telephone, utilizing an ATDS (automated telephone dialing system). See 47 USC Sec.  
19 227 et. seq. (private right of action-for any non-consented calls to a cell phone through an ATDS) and  
20 Spencer's First Claim For Relief.

21 To support this Opposition, Spencer, has attached a telephone log to the Complaint as Ex."1,"  
22 pleading the exact dates he received the ATDS calls from MRS on his cell phone. Spencer, has attached  
23 this Ex."1," to the Complaint to this Opposition as Ex."1." Attached as Ex."2a-d," hereto, are photos of  
24 the actual calls on Spencer's cell phone screen. Attached as Ex."3-a-c," are Texas PUC records that  
25 reveal MRS BPO, LLC, is licensed to use a machine in Texas, known as an ADAD (Automatic Dial  
26 Announcing Device). Attached hereto as Ex."4," is the Declaration of Craig K. Perry, Esq., that reveals  
27 that an pre-recorded voice answers "Thank you for calling MRS" when anyone calls the number that  
28 appeared in Spencer's cell phone -888-330-4552 (See Ex."2," hereto).

1 What this factual content reasonably infers to this court, is that MRS, is on notice, that it did in fact  
2 utilize the number (888-330-4552) when it called Spencer's cell phone on the dates pled in the complaint  
3 through an ATDS. It further infers that MRS owned or used ATDS or ADAD equipment on the dates  
4 pled in the complaint. The reasonable inference here, is that discovery will support that MRS called  
5 Spencer using an ATDS or ADAD in violation of the FTCF.

6  
7 MRS, has brought its motion, essentially claiming, the very narrow distinction, that Spencer's failure  
8 to plead a few more "facts" to support that MRS used an ATDS, which according to MRS, is a "shot in  
9 the dark" and that "(T)his omission is fatal to Plaintiff's TCPA claims." Motion, p.2, ll. 4-6. MRS, has  
10 no other argument for dismissal on the pleadings under Fed. R. Civ. P. 12(c) other than, the complaint is  
11 deficient in pleading sufficient facts, from which this court may reasonable infer, that MRS made the  
12 calls to Spencer through an ATDS. MRS does not raise as a disputed fact, in its motion herein, that it  
13 did not made the calls to Spencer's cell phone or that MRS had consent to call Spencer. Instead of raising  
14 the ATDS argument earlier, MRS, waited until the day before the last day to amend, before filing its  
15 motion, which may delay the trial in this matter.  
16

17  
18 However, what is really in the dark, is MRS's candor. MRS, upon information and belief, is also  
19 known as Monarch Recovery Management, Inc. (MRM) and has been sued many times for collection  
20 violations. See Ex."5," hereto, PACER print out of search of MRS cases, totaling an incredible 189  
21 actions. This provides the Court with further facts to reasonably infer MRS, is a sophisticated collection  
22 company, that uses an ATDS and this will be revealed in the pending discovery requests to MRS, attached  
23 hereto as Ex."6."  
24

25 Under these circumstances, there is factual content as pled and revealed in the telephone log and  
26 other related documents, for this Court to draw the reasonable inference that MRS did use an ATDS or  
27 ADAD to call Spencer's cell phone as pled and is in violation of the TCPA. If these facts do not persuade  
28

1 the Court, then Spencer should be allowed to amend his complaint to plead what is addressed in this  
 2 Opposition regarding MRS's use of an ATDS.

## 3 II.

### 4 ARGUMENT

#### 5 **A. Statement of Facts and Statement of the Case**

6 On July 16, 2014, Spencer owned and controlled a cell phone with the number: (702) XXX-8742,  
 7 the number to his cell phone. On July 16, 2014, Spencer received a non-consented call on his cell phone  
 8 (702-XXX-8742) from number "888-330-4552." See Ex."1," and Ex."2-a" hereto. Thereafter, Spencer  
 9 received similar calls to his cell phone, from the number "888-330-4552" on July 23, 2014, July 24, 2014  
 10 and August 8, 2014. Ex."1" and Ex."3-a-c;" Complaint, par. 11.  
 11  
 12

13 Spencer filed his action herein on November 4, 2014. MRS answered the complaint on December  
 14 9, 2014. On January 15, 2015, the parties filed their Joint Stipulated Discovery Plan and Scheduling  
 15 Order, which included a March 11, 2015 date for amendments. MRS filed its motion herein, on March  
 16 10, 2015. On March 23, 2015, Spencer served discovery requests upon MRS, that include requests  
 17 concerning its ADAD licensing in Texas and use of ATDS or ADAD equipment in general and as applied  
 18 to Spencer and use of the number 888-330-4552, the number that placed the calls to Spencer. These  
 19 discovery requests are attached hereto as Ex. "6."  
 20

#### 21 **B. Standard of Review**

22 Fed. R. Civ. P. 12(c), provides that after the pleadings are closed, a party may move for judgment  
 23 on the pleadings. A judgment on the pleadings, is appropriate when, taking all the allegations in the  
 24 pleadings as true, the moving party is entitled to judgment as a matter of law. *Fleming v. Pickard*, 581  
 25 F.3d 922, 925 (9<sup>th</sup> Cir. 2009). Analysis under Rule 12(c), is "substantially identical" to analysis under  
 26 Rule 12(b)(6), "because under both rules, 'a court must determine whether the facts alleged in the  
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 28

1 complaint, taken as true, entitled the plaintiff to a legal remedy.’’ See *Chavez v. U.S.*, 683 F.3d 1102,  
 2 1109 (9<sup>th</sup> Cir. 2012)(citing to *Brooks v. Dunlap Mfg. Inc.*, No. C 10-04341 CRB, 2011, WL 6140912, at  
 3 \*3 (N.D. Cal., Dec. 9, 2011); Wright & Miller, Federal Practice and Procedure, Sec. 1367.

4 However, ‘‘a Court should **only** grant a motion for judgment on the pleadings if it is clear that the  
 5 merits of the controversy can be **fully and fairly decided in this summary manner.**’’ See *Scranton*  
 6 *Times, LP. v. Wilkes-Barre Publishing Co.*, 2009 WL 3100963, \*2 (M.D. Pa 2009), citing to Wright &  
 7 Miller, Sec. 1369, emphasis added. Further, in determining motions under Rule 12(c), ‘‘courts cannot  
 8 examine statements in an answer or other pleading and decide, on the basis of their own intuition that the  
 9 statements are implausible or a sham and thus can be disregarded...(F)actual allegations in a  
 10 pleading...must be presumed to be true. *In Re Mortgages Ltd.*, 771 F.3d 628, 632 (9<sup>th</sup> Cir. 2014)(emphasis  
 11 added).  
 12  
 13

14 On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint ‘‘contain(s)  
 15 sufficient factual mater, accepted as true, to ‘state a claim to relief that is plausible on it face.’’ *Ashcroft*  
 16 *v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(quoting *Bell Atl., Corp. Twombly*,  
 17 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A ‘‘claim has facial plausibility when the  
 18 plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant  
 19 is liable for the misconduct alleged.’’ Id. In ‘‘(D)etermining whether a complaint states a plausible claim  
 20 for relief will...be a context-specific task that requires the reviewing court to draw on its judicial  
 21 experience and common sense.’’ Id. *Iqbal*, at 679, 129 S.Ct. 1937.  
 22  
 23

24 In applying this standard to a TCPA claim, alleging the use of an ATDS, other courts have described,  
 25 that ‘‘(I)t is not unreasonable, however, to require a plaintiff to describe the phone messages he received  
 26 in laymen’s terms or provide the circumstances surrounding them to establish his belief that the messages  
 27 were pre-recorded or delivered via the ATDS.’’ See *Johansen, v. Vivant, Inc.*, 2012 WL 6590551 \* 3  
 28

(N.D. Ill., Dec. 18, 2012)(Motion to Dismiss granted, but Plaintiff given leave to file amended complaint, emphasis added). In fact, “an exhibit of a defendant’s application to register an ‘automatic dial announcing device’” can be considered by the court in determining the plausibility of a complaint for violations of the TCPA. See *Johansen v. Vivant, Inc.*, supra., at page 2, citing to *Martin v. Leading Edge Recovery Solutions, LLC*, No. 11C5886, 2012 U.S. Dist., 2012 WL 32928838 (N.D. Ill., Aug. 10, 2012).

As will be illustrated below, Spencer has pled in laymen’s terms, as best he can without the aid of discovery, MRS’s use of an ATDS and reasonable inferences thereto and if more factual terms are needed, then Spencer should be allowed to amend his complaint.

### **C. TCPA Claims**

The TCPA regulates the use of telephones to contact consumers. It forbids the use of certain automated telephone equipment, including using “any automatic telephone dialing system or an artificial or prerecorded voice” to call cellular telephone without “prior express consent” of the consumer. 47 USC Sec. 227(b)(1)(A)(iii).

An “automatic telephone dialing system” (hereinafter “autodialer”) means equipment which has the capacity: “(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” 47 USC Sec. 227(a)(1)(A)-(B). In contrast, Spencer has pled in laymen’s terms in the complaint, and within the Court’s experience and common sense, that the calls from MRS were “robocalls” meaning the same as an autodialer. In other words, the calls may be reasonably inferred to be from an ATDS, where the calls come from equipment that has “the capacity to dial numbers without human intervention.” See *Lardner v. Diversified Consultants, Inc.*, 17 F.Supp.3d 1215, \*5 (S.D. Fla. 2014).

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**D. Plaintiff Has Sufficiently Pled There is a Reasonable Inference From Available Factual Content That The Calls to Spencer Came From MRS and ATDS Equipment Was Used by MRS**

The issue before the Court, is not whether Spencer will prevail on his TCPA claim, but whether Spencer is entitled at this stage of the action, to offer evidence to support his claims. The following are the facts pled by Spencer, without the aid of discovery. These facts, clearly also raise a reasonable expectation that discovery will reveal evidence of the alleged violations by MRS.

Spencer pled the following in the Complaint concerning MRS's use of an ATDS:

11. Beginning on or about Wednesday, July 16, 2014, Plaintiff began receiving **robocalls** from MRS to his cell phone number. Plaintiff also received **robocalls** on or about July 23, 2014, July 24, 2014 and August 8, 2014. (See Ex.1). A **robocall is any call made using an automatic telephone dialing system** (*LCCA/er v. CashCalif.* 554 F.Supp.2d 1025 (N.D. Cal. 2008)). These calls violate the Telephone Consumer Protection Act, 47 U.S.C. 227. **Robocalls** are not permitted when there is neither (1) an established business relationship (see 227(a)(2)) nor (2) prior express consent (see 227(b)(1)(A)). See Complaint, par. 11 (emphasis added).

Ex."1," Spencer's telephone log, incorporated by reference in paragraph 11 in the Complaint and attached to the Complaint and hereto also as Ex."1," states as follows:

**CALL LOG**

<b><u>CALL #</u></b>	<b><u>CALL DATE</u></b>	<b><u>CALL TIME</u></b>	<b><u>CALL FROM #</u></b>	<b><u>CALL RESULT</u></b>	<b><u>EVIDENCE</u></b>
1	7/16/2014	9:08:00	888-330-4552	hung up	pic
2	7/23/2014	14:07:00	888-330-4552	hung up	pic
3	7/24/2014	15:23:00	888-330-4552	hung up	pic
4	8/8/2014	16:46:00	888-330-4552	hung up	pic

Attached hereto as Ex."3a-c", are true and correct copies of records from the Texas PUC website, that reveals that MRS BPO LLC, was awarded a Permit, No. 090147 (valid from 12/18/2009 to last renewal of 12/18/2014) for an "ADAD." The Texas PUC, defines an ADAD as an Automatic Dial Announcing Devices. See Texas, PUC Rules, Chapter 26.

Attached hereto as Ex.”2a-d”, are photos taken by Spencer of his cell phone screen for each of the calls from MRS made from an ATDS to his cell phone, that state the following, except for the dates:

**RECENT CALLS**

**Missed**

**877-411-5551**

**No Name**

**888-330-4552**

**9:08A Jul 16**

Attached hereto as Ex.”4,” is the Declaration of Spencer’s counsel, Craig K. Perry, Esq., that declares at paragraph 2, that before the complaint was filed and on March 23, 2015, he placed a call to “**888-330-4552**” and that there was a pre-recorded voice that answered stating: “**Thank you for calling MRS, your call will be monitored...**” Even today, if one calls, the same recording can be heard.

The foregoing evidence, are “facts” that must be considered as true by the Court in its Rule 12(c)/12(b)(6) analysis for reasonable inferences that MRS used an ATDS and violated the TCPA. First the telephone number, “888-330-4552” appearing on Spencer’s cell phone screen, is a number used by MRS and all four calls came from that same number. Ex.”4,” at par. 3. All four calls are documented in Ex. “2,” and incorporated by reference in Ex.”1,” to the Complaint and Ex.”1,” hereto.

MRS has a Texas PUC Permit to use what Texas calls an ADAD (automatic dial announcing devices). Ex.”3.” The permit appears to have been valid during the July and August, 2014 dates that the calls were made to Spencer.

The gist of MRS’s motion herein, is that Spencer “**does not allege any facts** relevant to an ATDS or artificial or prerecorded voice, nor could he...**This omission is fatal** to Plaintiff’s TCPA claim and this Court should dismiss Plaintiff’s Complaint.” Motion, p.2, ll. 12-15. However, Spencer has pled “facts” in laymen’s terms, without the aid of discovery from MRS, that transcends the speculative and states an TCPA claim, that is plausible on its face.



1 This Court may utilize its experience and common sense, to determine that a “robocall” is a modern  
 2 laymens’s term, widely used in business, advertisements, news articles, by Federal and State lawmakers  
 3 and the Courts, to describe calls by automatic dialing equipment. For example, Wikipedia, defines it as:  
 4 “A robocall is a phone call that uses a computerized autodialer to deliver a pre-recorded message, as if  
 5 from a robot.” The “888” prefix for the MRS number at issue, is a toll free number, widely used by debt  
 6 collection companies, such as MRS. MRS is certainly well aware of the term, given its ongoing duties of  
 7 compliance, and ownership of its equipment. Accord, *Johansen v. Vivant, Inc.*, 2012 WL 6590551, \*3  
 8 (N.D. Ill. 2012)(application for an automatic dial announcing device is relevant evidence that an ATDS  
 9 was used).

10  
 11 Spencer, should not have to specifically plead, with precision, that MRS has a permit in Texas for  
 12 autodialers or that a pre-recorded voice states “Thank you for calling MRS...” when the number 888-  
 13 330-4552 is called. When all of these facts are taken as true, it is reasonable for this Court to infer, that  
 14 MRS used an autodialer (had a permit for one in Texas) when it called Spencer from an 888 toll-free  
 15 number (widely used by debt collectors) multiple times without his consent and reasonable to infer MRS  
 16 violated the TCPA and is liable to Spencer. The merits of this action, simply cannot be fairly and fully  
 17 determined in the summary fashion asserted by MRS in its motion. The Complaint is plausible on its face  
 18 to plead a violation of the TCPA and if not, then Spencer should be allowed to amend the complaint.  
 19 MRS’s motion should be denied. Fed. R.Civ.P. 12(c).

### 22 CONCLUSION

23  
 24 Based upon the foregoing, Plaintiff’s complaint is plausible on its face, to reasonable infer that MRS  
 25 used an ATDS autodialer equipment when it called the Plaintiff’s cell phone multiples times, without the  
 26 Plaintiff’s consent and is in violation of the TCPA and liable to Spencer. The Court should deny the  
 27 Defendants Motion For Judgment On The Pleadings or in the alternative, grant leave to  
 28

1 amend. Fed.R.Civ. P. 12(c), Fed.R.Civ. P. 12(b)(6).

2 DATED this 24<sup>th</sup> day of March, 2015.

3 CRAIG K. PERRY & ASSOCIATES

4 /s/ Craig K. Perry, Esq.

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10 Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of CRAIG K. PERRY & ASSOCIATES and that on this 24<sup>th</sup> day of March, 2015, I did cause a true copy of the foregoing OPPOSITION TO DEFENDANT'S MRS BPO LLC's MOTION FOR JUDGMENT ON THE PLEADINGS, to be served via CM/ECF electronic filing upon the following person(s):

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\_\_\_\_\_  
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